Dura Art Stone, Inc. *and* United Electrical, Radio and Machine Workers of America (UE), Petitioner and Amalgamated Industrial Workers Union, NFIU, AFL–CIO, Intervenor No. 1 and Hod Carriers and Laborers Local 783, Laborers International Union of North America, AFL–CIO, Intervenor No. 2. Case 31–RC–8177

October 31, 2003

ORDER DENYING REVIEW

BY MEMBERS LIEBMAN, SCHAUMBER, AND WALSH

The National Labor Relations Board, by a three-member panel, has carefully considered the Employer and Intervenor No. 1's joint request for review of the Regional Director's Decision and Direction of Election (pertinent portions of which are attached as an appendix). The request for review is denied as it raises no substantial issues warranting review.[1]

Dated, Washington, D.C. October 31, 2003

Wilma B. Liebman, Member

Peter C. Schaumber, Member

Dennis P. Walsh, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

DECISION AND DIRECTION OF ELECTION

The United Electrical Radio & Machine Workers of America (UE or the Petitioner) filed a petition under Section 9(c) of the National Labor Relations Act (the Act), as amended, seeking to represent a unit of production and maintenance employees employed by the Employer, Dura Art Stone, Inc. The Employer and the Amalgamated Industrial Workers Union (AIWU or Intervener No.1[1]) assert that I should transfer this case to the Board for decision. They further assert that if I do not transfer this case to the Board for decision, then I should find that an election should not be conducted in light of pending "blocking" unfair labor practice charges and that further processing of the representation petition is precluded by a contract bar. The Employer and the AIWU also assert that if I do conduct an election, the ballots should be impounded pending a decision by the Board in the pending unfair labor practice cases.

In order to provide a context for the arguments of the Employer and the AIWU, in Section I of this Decision, I will describe the procedural background of this case. In Section II, I will address the above-described assertions of the Employer and the AIWU.

I. PROCEDURAL BACKGROUND

The AIWU was certified as the exclusive collective-bargaining representative of the Employer's employees in 1990. The Petitioner filed the representation petition in this matter on October 28, 2002. On November 4, 2002, the Petitioner filed unfair labor practice charges against AIWU and the Employer and thereafter I issued a consolidated complaint.[2] An unfair labor practice hearing was held and on July 31, 2003, the administrative law judge issued a Decision and Order, finding that the Employer and AIWU violated the Act as alleged. The Employer and AIWU have filed exceptions to the decision of the administrative law judge.[3] On August 13, 2003, the United States District Court for the Central District of California granted the Application for Temporary Injunction under Section 10(j) of the Act, which I filed for and on behalf of the Board. The District Court ordered, inter alia, that the Employer cease recognizing AIWU Local 61 unless and until it is certified by the Board and it further ordered that the Employer and AIWU Local 61 cease giving effect to a collective-bargaining agreement that they had executed on October 17, 2002.

Although I initially postponed the hearing in this matter in light of the pendency of the unfair labor practice charges, on August 26, 2003, I issued an Order Resetting Hearing. The Employer and the AIWU filed a Joint Motion to Vacate the Order Resetting Hearing. On September 2, 2003, I issued an Order Denying that Joint Motion to Vacate Order Resetting Hearing.[4] Thereafter, the hearing in this matter was held on September 4, 2003.

[1] In denying review, we find it unnecessary to rely on the Regional Director's conclusion that the issuance by the District Court of the Temporary Injunction and Order constitutes an "unusual circumstance" under *Mistletoe Express Service*, 268 NLRB 1245 (1984).

[1] Hod Carriers and Laborers, Local 783, Laborers International Union of North America, AFL–CIO (Local 783) also has intervened in this matter. Local 783 is identified in this proceeding as Intervener No.2.

[2] The consolidated complaint in these cases (31–CA–26009 and 31–CB–11160) allege violations of Sec. 8(a)(1)(2)(3) and 8(b)(1)(A) and 8(b)(2).

[3] I take administrative notice of the filing of the unfair labor practice charges, the issuance of the consolidated complaint, the issuance of the Decision and Order of the administrative law judge, the filing of exceptions to the decision of the administrative law judge, and the documents filed in District Court in connection with the 10(j) proceedings.

[4] This order, which is contained in the record as Board Exh. No. 1(i), erroneously is captioned *Order Denying Petitioner's and Intervener's Joint Motion to Vacate Order Resetting Hearing.* I hereby correct the caption of that Order to read *Order Denying Employer's and Intervener Amalgamated Industrial Workers Union's Joint Motion to Vacate Order Resetting Hearing*.

II. DISCUSSION AND CONCLUSIONS WITH RESPECT TO THE ASSERTIONS OF THE EMPLOYER AND THE AIWU

A. Due Process Does Not Require that I Transfer this Case to the Board for Decision

The Board has delegated its authority in this proceeding to me under Section 3(b) of the Act. At the outset, I conclude that neither the Employer nor the AIWU have substantiated their assertion that due process requires that I transfer this case to the Board[5] for decision since I was the Petitioner in the Section 10(j) proceedings filed against the Employer and AIWU Local 61.[6] I do not find that the fact that I am the Petitioner in the 10(j) proceedings creates a conflict of interest for me in rendering this decision. Nor do I find that due process requires that the case be transferred to the Board.[7] Moreover, I note that all of my rulings are subject to review by the Board.[8] Therefore, I deny the request of the Employer and the AIWU that I transfer this case to the Board.

B. Board Authority Does Not Require that the Petition in this Matter Be Held in Abeyance Pending the Board's Order in Related Unfair Labor Practice Cases

I reject the assertion by the Employer and the AIWU that Board authority requires that the instant petition be held in abeyance pending the Board's order in the unfair labor practice charges. As I noted in my Order Denying the Joint Motion to Vacate Order Resetting Hearing, in the circumstances of this case, proceeding in this representational matter is an appropriate exercise of the authority granted to me by the Board to process questions concerning representation. I do not find that any Board authority cited by the Employer or the AIWU requires that I do otherwise. To the contrary, I conclude that my administrative determination to proceed with the processing of this representation petition will best effectuate the policies of the Act.

The Employer and the AIWU allege that the NLRB Case Handling Manual for Representational Proceedings provides for the blocking of the instant representation petition in light of the pending charges in the absence of a valid *Carlson* waiver[9]; and, they allege that since there has not yet been a Board order in the unfair labor practice cases, there cannot be a valid *Carlson* waiver. I reject the argument of the Employer and the AIWU that a *Carlson* waiver would not be appropriate in this case and I adhere to my administrative determination[10] to proceed with the processing of this representation matter in light of the District Court Order removing the alleged contract bar.[11] The cases cited by the Employer and AIWU are distinguishable. In *Mistletoe Express,* supra, and *Town & Country,* 194 NLRB 1135 (1972), the Board denied the petitioners' requests to proceed with representation proceedings because to do so would require the resolution of the issue of whether there was a contract bar and the resolution of the contract bar issue would have required the litigation of unfair labor practice allegations in the context of the representation proceeding. In the case herein, in light of the District Court Order that the parties cease giving effect to the contract alleged to be a bar, the processing of this representation matter does not require the litigation of unfair labor allegations.

I also note that in *Mistletoe Express*, supra at 1247, the Board stated that *Carlson* waivers are appropriate when unfair labor practices have been litigated or when unusual circumstances warrant such a waiver. I conclude that the issuance by the District Court of the Temporary Injunction and Order constitutes an "unusual circumstance" rendering the *Carlson* waiver appropriate.[12]

C. The Processing of this Petition is not Precluded by a Contract Bar

The AIWU asserts that since the Board has not issued an order that the 2003–2005 collective-bargaining agreement executed by the AIWU and the Employer is unlawful, that agreement constitutes a bar to an election. I disagree with this assertion. Since the U.S. District Court for the Central District of California issued an Order on August 13, 2003, pursuant to Section 10(j) of the Act, that the Employer and AIWU Local 61 cease giving effect to the 2002—2005 collective-bargaining agreement, that agreement cannot serve as a contract bar.

D. The Determination With Respect to Whether the Ballots Should Be Impounded Will Be Administratively Determined at a Later Date

The Employer and the AIWU assert that if I do direct an election, as I am doing, then the ballots cast in that election should be impounded until the conclusion of the proceedings on

[5] At the hearing, the Employer and the AIWU took the position that the case should be transferred to another Regional Director for decision. However, in their posthearing briefs they take the position that since exceptions have been filed with the Board with respect to the decision of the administrative law judge, it would be more appropriate to transfer the case to the Board.

[6] The Employer and AIWU also assert that the Regional attorney and the assistant to the Regional Director have conflicts of interest in this matter.

[7] I note that in the 10(j) proceeding, I am the Petitioner "*for and on behalf of the National Labor Relations Board*." Therefore, the argument that it would be inappropriate for me to render this decision, but appropriate for the Board to do so, is fallacious.

[8] See *French Hospital Medical Center,* 254 NLRB 711 fn. 3 (1981).

[9] See *Carlson Furniture Industries,* 157 NLRB 851, 853 (1966).

[10] See reference by the Board in *Intalco Aluminum Corp*., 174 NLRB 975 at fn. 6 (1969), to the Board's "undisputed discretion with respect to the timing of an election." As the Board noted in that case, "the question of when and under what circumstances to direct an election in the face of unresolved 8(a)(2) charges remains one for the Board to decide."

[11] See *Continental Can Co.,* 282 NLRB 1363 (1987).

[12] In *Town and Country*, supra at 1136, the Board notes *Carlson* waiver cases in which the Board conducts an election, despite the pendency of charges which normally "block" the election, because a contract was removed as a bar "either because the Board had already found the violation of Section 8(a)(2) in the companion unfair labor practice case or for reasons apparent in the context of the record in the representation proceeding." In the instant case, the reason that the contract has been removed as a bar is apparent in the context of the representation case: the District Court for the Central District of California has issued a Temporary Injunction requiring that the parties cease giving effect to that contract.

the unfair labor practice complaint. It is not necessary for me to determine at this point in time whether the ballots should be impounded. That issue will be administratively determined at a later date.